

2. Where persons hold more than 5% of a class under a voting trust or similar agreement, provide the following:

- (a) the title of such securities;
- (b) the amount that they hold under the trust or agreement (if not clear from the table);
- (c) the duration of the agreement;
- (d) the names and addresses of the voting trustees; and
- (e) a brief outline of the voting rights and other powers of the voting trustees under the trust or agreement.

3. Calculate the percentages on the basis of the amount of outstanding securities plus, for each person or group, any securities that person or group has the right to acquire within 60 days pursuant to options, warrants, conversion privileges or other rights.

4. In this Item, a *beneficial owner* of a security means:

(a) Any person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise has or shares:

- (1) Voting power, which includes the power to vote, or to direct the voting of, such security; or
- (2) Investment power, which includes the power to dispose, or to direct the disposition of, such security.

(b) Any person who, directly or indirectly, creates or uses a trust, proxy, power of attorney, pooling arrangement or any other contract, arrangement or device with the purpose or effect of divesting such person of beneficial ownership of a security or preventing the vesting of such beneficial ownership.

5. All securities of the same class beneficially owned by a person, regardless of the form that such beneficial ownership takes, shall be totaled in calculating the number of shares beneficially owned by such person.

6. The small business issuer is responsible for knowing the contents of any statements filed with the Commission under section 13(d) or 13(g) of the Exchange Act concerning the beneficial ownership of securities and may rely upon the information in such statements unless it knows or has reason to believe that the information is not complete or accurate.

7. The term "group" means two or more persons acting as a partnership, syndicate, or other group for the purpose of acquiring, holding or disposing of securities of an issuer.

8. Where the small business issuer lists more than one beneficial owner for the same securities, adequate disclosure should be included to avoid confusion.

[57 FR 36449, Aug. 13, 1992, as amended at 57 FR 48150, Oct. 21, 1992]

#### § 228.404 (Item 404) Certain Relationships and Related Transactions.

(a) Describe any transaction during the last two years, or proposed transactions, to which the small business issuer was or is to be a party, in which any of the following persons had or is to have a direct or indirect material interest. Give the name of the person, the relationship to the issuer, nature of the person's interest in the transaction and, the amount of such interest:

(1) Any director or executive officer of the small business issuer;

(2) Any nominee for election as a director;

(3) Any security holder named in response to Item 403 (§ 228.403); and

(4) Any member of the immediate family (including spouse, parents, children, siblings, and in-laws) of any of the persons in paragraphs (a) (1), (2) or (3) of this Item.

(b) No information need be included for any transaction where:

(1) Competitive bids determine the rates or charges involved in the transaction;

(2) The transaction involves services at rates or charges fixed by law or governmental authority;

(3) The transaction involves services as a bank depository of funds, transfer agent, registrar, trustee under a trust indenture, or similar services;

(4) The amount involved in the transaction or a series of similar transactions does not exceed \$60,000; or

(5) The interest of the person arises solely from the ownership of securities of the small business issuer and the person receives no extra or special benefit that was not shared equally (pro rata) by all holders of securities of the class.

(c) List all parents of the small business issuer showing the basis of control and as to each parent, the percentage of voting securities owned or other basis of control by its immediate parent if any.

(d) *Transactions with promoters.* Issuers organized within the past five years shall:

(1) State the names of the promoters, the nature and amount of anything of value (including money, property, contracts, options or rights of any kind)

received or to be received by each promoter, directly or indirectly, from the issuer and the nature and amount of any assets, services or other consideration therefore received or to be received by the registrant; and

(2) As to any assets acquired or to be acquired from a promoter, state the amount at which the assets were acquired or are to be acquired and the principle followed or to be followed in determining such amount and identify the persons making the determination and their relationship, if any, with the registrant or any promoter. If the assets were acquired by the promoter within two years prior to their transfer to the issuer, also state the cost thereof to the promoter.

*Instructions to Item 404:* 1. A person does not have a material indirect interest in a transaction within the meaning of this Item where:

(a) The interest arises only:

(1) from such person's position as a director of another corporation or organization (other than a partnership) which is a party to the transaction and/or

(2) from the total ownership (direct or indirect) by all specified persons of less than a 10% equity interest in another person (other than a partnership) which is a party to the transaction;

(b) The interest arises only from such person's position as a limited partner in a partnership in which he and all other specified persons had an interest of less than 10 percent; or

(c) The interest of such person arises solely from holding an equity interest (but not a general partnership interest) or a creditor interest in another person that is a party to the transaction and the transaction is not material to such other person.

2. Include information for any material underwriting discounts and commissions upon the sale of securities by the small business issuer where any of the specified persons was or is to be a principal underwriter or is a controlling person or member of a firm that was or is to be a principle underwriter.

3. As to any transaction involving the purchase or sale of assets by or to the small business issuer otherwise than in the ordinary course of business, state the cost of the assets to the purchase and if acquired by the seller within two years before the transaction, the cost thereof to the seller.

**§ 228.405 (Item 405) Compliance With Section 16(a) of the Exchange Act.**

Every small business issuer that has a class of equity securities registered

pursuant to Section 12 of the Exchange Act (15 U.S.C. 78f) shall:

(a) Based solely upon a review of Forms 3 and 4 (17 CFR 249.103 and 249.104 of this chapter) and amendments thereto furnished to the registrant under Rule 16a-3(e) (17 CFR 240.16a-3(e) of this chapter) during its most recent fiscal year and Forms 5 and amendments thereto (§249.105 of this chapter) furnished to the registrant with respect to its most recent fiscal year, and any written representation referred to in paragraph (b)(2)(i) of this Item:

(1) Under the caption "Section 16(a) Beneficial Ownership Reporting Compliance," identify each person who, at any time during the fiscal year, was a director, officer, beneficial owner of more than ten percent of any class of equity securities of the registrant registered pursuant to section 12 ("reporting person") that failed to file on a timely basis, as disclosed in the above Forms, reports required by section 16(a) of the Exchange Act during the most recent fiscal year or prior fiscal years.

(2) For each such person, set forth the number of late reports, the number of transactions that were not reported on a timely basis, and any known failure to file a required Form. A known failure to file would include, but not be limited to, a failure to file a Form 3, which is required of all reporting persons, and a failure to file a Form 5 in the absence of the written representation referred to in paragraph (b)(2)(i) of this section, unless the registrant otherwise knows that no Form 5 is required.

NOTE: The disclosure requirement is based on a review of the forms submitted to the registrant during and with respect to its most recent fiscal year, as specified above. Accordingly, a failure to file timely need only be disclosed once. For example, if in the most recently concluded fiscal year a reporting person filed a Form 4 disclosing a transaction that took place in the prior fiscal year, and should have been reported in that year, the registrant should disclose that late filing and transaction pursuant to this Item for the most recent fiscal year, but not in material filed with respect to subsequent years.

(b) With respect to the disclosure required by paragraph (a) of this Item: